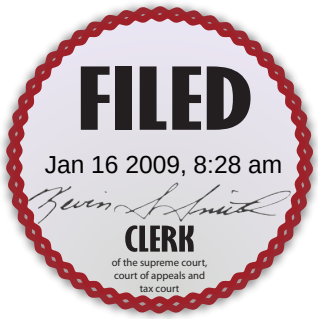

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IN THE
COURT OF APPEALS OF INDIANA

JOHNNY LEE BRASTER, III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0806-CR-324
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0711-FA-76

January 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Johnny Lee Braster appeals his ten-year executed sentence for Class B felony unlawful possession of a firearm by a serious violent felon. We affirm.

Issue

The issue before us is whether Braster was properly sentenced.

Facts

On November 8, 2007, Braster was arrested and charged with one count of Class A felony dealing in cocaine, one count of Class B felony unlawful possession of a firearm by a serious violent felon, and one count of Class A misdemeanor possession of marijuana. The probable cause affidavit alleged that after Braster was pulled over for speeding, officers observed that he was smoking a cigarette that later field-tested positive for marijuana. Additionally, a digital scale with white powder residue on it allegedly was found on Braster's person, cocaine was found on the center console, and a handgun was found between the center console and passenger seat.

Braster agreed to plead guilty to Class B felony unlawful possession of a firearm by a serious violent felon, and the State in exchange agreed to dismiss the cocaine and marijuana charges. The plea agreement also placed a cap of ten years on the executed portion of any sentence. At the sentencing hearing, the trial court indicated that it had been inclined to impose a sentence of six years, but then noted the allegations that Braster also was found to be smoking marijuana and in possession of eleven grams of cocaine

and a scale when police stopped him. The trial court then proceeded to impose a term of ten years executed. Braster now appeals his sentence.

Analysis

Braster requests that we revise his sentence to a term of ten years total, but with only six years executed and four years suspended. We engage in a four-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Braster contends that his sentence is inappropriate. At the same time, however, he argues that the trial court relied upon an improper consideration in sentencing him, which is an abuse of discretion claim. As we recently reiterated, "inappropriate sentence and abuse of discretion claims are to be analyzed separately." King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). An abuse of discretion in identifying or not identifying

aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing a sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Here, it would appear the trial court in sentencing Braster placed substantial reliance on facts stated in the probable cause affidavit, which Braster did not admit were true, surrounding Braster's alleged dealing in cocaine and possession of marijuana. Those charges were dismissed as part of Braster's plea agreement. This court has held, "If a trial court accepts a plea agreement under which the State agrees to drop or not file charges, and then uses facts that give rise to those charges to enhance a sentence, it in effect circumvents the plea agreement." Roney v. State, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), trans. denied. The trial court may have abused its discretion in relying on allegations that Braster committed dealing in cocaine and possession of marijuana when sentencing him for unlawful possession of a firearm by a serious violent felon.

Nevertheless, we are not inclined to find Braster's sentence inappropriate in light of his character and the nature of the offense. See Anglemyer, 868 N.E.2d at 491. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v.

State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

Even if we were to disregard the allegations of cocaine dealing and marijuana possession in the probable cause affidavit and conclude that there was nothing particularly egregious about the offense Braster was convicted of, we conclude his character warrants the sentence he received. We first note that although Braster frames his argument as if he received a maximum sentence, he only received the advisory sentence for a Class B felony, not the maximum. See Ind. Code § 35-50-2-5. The fact that Braster received the maximum executed sentence he could have received under his plea agreement does not mean that he received a maximum sentence for purposes of our appropriateness analysis. Furthermore, the plea agreement did not prohibit the trial court from imposing a sentence longer than ten years, so long as any additional time was suspended. We will analyze the appropriateness of Braster's sentence with reference to the twenty-year maximum for a Class B felony.

Braster's criminal history, while not extremely extensive, is far from non-existent. He has a 1990 juvenile adjudication for criminal mischief. As an adult, he has been convicted of misdemeanor resisting law enforcement, possession of marijuana, minor possession of alcohol, driving with a suspended license, and battery; his most recent conviction is from 1999. He has two Class B felony convictions, both from 1995, for

dealing in cocaine. Although Braster had several years of not being arrested for any offense before committing the present crime, and had managed to obtain steady, gainful employment during those years, the sheer number of offenses committed during the 1990s reflects poorly on his character. This by itself is sufficient to warrant the ten-year executed sentence.

Braster contends that his guilty plea merits a reduced executed sentence. A guilty plea usually is entitled to some mitigating weight, although the amount of such weight varies from case to case. Sanchez v. State, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008). Where a defendant receives a substantial benefit from the plea agreement, its significance as a mitigator is reduced. See id. Although it may not have been a foregone conclusion that the State could have convicted Braster of a Class A felony and Class A misdemeanor in addition to the Class B felony to which he pled guilty, Braster still avoided the possibility of a greatly increased sentencing range by pleading guilty. The substantial benefit Braster received from the plea is such that its mitigating weight does not necessarily outweigh his criminal history.

Braster also contends that his sentence will pose a hardship to his dependents. The presentence report indicates that Braster has custody of three children and pays support for two other children. However, Braster apparently concedes that his sentence is not completely suspendable and that he must serve at least six years in prison, pursuant to Indiana Code Section 35-50-2-2(b)(1). The fact is, even if Braster received the minimum possible executed time of six years and earned one-for-one good time credit while

incarcerated, he still will be unable to provide for his dependents for at least three years. As it is, the mothers and other relatives of Braster's children are going to be forced to replace his financial support anyway because of his decision to commit a Class B felony. Jail is always a hardship on dependents. See Vazquez v. State, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), trans. denied. Braster fails to explain how or why a ten-year executed sentence, with five served, would be significantly more difficult on his dependents than a six-year executed sentence, with three served. We decline to reduce Braster's sentence on this basis.

Conclusion

Even if the trial court abused its discretion in sentencing Braster, we still find his sentence to be appropriate. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.